TING ING KWONG v. LAU KAH KING

[A.Cr.J. (Tan Chiaw Thong) September 23, 1975]
[Sibu — Criminal Appeal No. 2 of 1974]

Criminal Law & Procedure — Jurisdiction — Offences punishable under s. 17(1) & (2) of the Rent Control Ordinance (Cap. 86) and s. 199 of the Penal Code (Cap. 57) — Prosecution allowed under s. 335(3) of the Criminal Procedure Code (Cap. 58) — Whether counsel had jurisdiction to prosecute — Rent Control Ordinance (Cap. 86), s. 17(1) & (2) — Penal Code (Cap. 57), s. 199 — Criminal Procedure Code (Cap. 58), s. 335(2) & (3) — Interpretation Ordinance (Cap. 1), s. 3(1).

The appellant was prosecuted in the lower court as a result of a complaint made to the learned magistrate by one of the landlords of the premises of which the appellant was the tenant. The complaint was received by the said magistrate in accordance with section 119(1) of the Criminal Procedure Code as a result of which a summons against the appellant was issued under section 122(1) of the Criminal Procedure Code. The learned magistrate had acted under section 335(2) of the Criminal Procedure Code in allowing the private prosecution to proceed against the appellant.

The appellant was convicted in the lower court of offences punishable under section 17(1) and (2) of the Rent Control Ordinance and section 199 of the Penal Code. He appealed on the ground, *inter alia*, that the advocate who conducted the prosecution in the lower court had no jurisdiction to do so. The issue involved the construction of section 335(3) of the Criminal Procedure Code.

Held: (1) before a court is in a position to exercise the discretionary power conferred under section 335(2) of the Criminal Procedure Code, all matters which are relevant should be made available to the court in order to enable it to properly and judicially exercise that discretionary power;

(2) an offence under section 199 of the Penal Code cannot in any sense be regarded as an offence against the person or property of a private prosecutor within the meaning of section 335(3) of the Criminal Procedure Code;

(3) in respect of the offence under the said section 199, there being no legally competent person to conduct the prosecution against the appellant in the lower court and there being none directed by the lower court to conduct such prosecution, the whole proceedings in relation to the charge under the said section were null and void.

CRIMINAL APPEAL.

Joseph Tang for the appellant.

Chong Siew Chiang for the respondent.

Tan Chiaw Thong J.: The appellant was convicted in the lower court of two offences: firstly, of having failed to comply with the requirements of a notice given to him by his landlords under section 17(1) of the Rent Control Ordinance, in that he failed to give the name of one of his sub-tenants in a statutory declaration made by him pursuant to the said notice, an offence punishable under section 17(2) of the said Ordinance; and secondly, of having made a false statement in the said statutory declaration relating to the monthly rental which he received from another sub-tenant, an offence punishable under section 199 of the Penal Code. He appeals to this court on various grounds, one of which alleged that the advocate who conducted the prosecution in the lower court had no jurisdiction to do so. This judgment is concerned solely with this ground of appeal since if the court rules in favour of the appellant, the other grounds of appeal will become academic because the whole trial in the lower court would have been a nullity. Learned counsel for both parties agree that the court should make a decision on this ground of appeal and that the other grounds will be argued if the court decides in favour of the respondent on this ground. The Assistant State Attorney-General appeared as *amicus curiae* during the argument on this ground of appeal at the invitation of the court.

The prosecution in the lower court arose out of a complaint made to the learned trial magistrate by one of the landlords of premises of which the appellant was the tenant. The complaint was received by the said magistrate in accordance with section 119(1) of the Criminal Procedure Code (hereinafter referred to as "the C.P.C.") as a result of which, the magistrate being of the opinion that there was sufficient ground for proceeding against the appellant, the issue of a summons against the appellant was granted by him under section 122(1) of the C.P.C. The objection to the jurisdiction of the advocate who conducted the prosecution in the lower court was taken by learned counsel for the appellant at a late stage in the trial before the lower court which did not allow it to be argued on the following grounds as given by the learned trial magistrate:—

> "This court examined complainant, Lau Kah King in accordance with section 119 of Criminal Procedure Code and after careful consideration and examination of the document, I found that there is sufficient ground for proceeding and I order that a summons to be issued against accused. A summons was in fact issued against accused. From this it is already an implication of this court that complainant has the right to proceed a private prosecution. The court has acted under section 335(3) of Criminal Procedure Code — it being an offence committed by accused against complainant's own person or property.
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> Accordingly, I feel that since defence has closed his case, that should be the end of the matter. If the accused thinks that the procedure is wrong, then he should take up the matter in High Court. This is because this court has already issued a summons against accused and the proceeding has already concluded. Accordingly, the application is not allowed."

From the decision of the learned trial magistrate which has been quoted, it is clear that in allowing the private prosecution to proceed and learned counsel for the respondent to conduct the prosecution against the appellant, he has acted under section 335(3) of the C.P.C. Nowhere in the record of the proceedings is there any indication that the provisions of section 335(2) of the C.P.C. were ever present in the mind of the learned trial magistrate.

The provisions relating to the conduct of prosecutions are contained in section 335 of the C.P.C. These provisions govern all criminal prosecutions as is clear from the provisions of section 3 of the C.P.C. which, *inter alia*, stipulates that all offences under any law shall be inquired into and tried according to the provisions of the C.P.C., subject however to any Ordinance for the time being in force regulating the manner or place of inquiring into or trying such offences. In this connection, it is to be noted that there are no special provisions in the Rent Control Ordinance regulating the manner of trial of any offence punishable under section 17(2) of that Ordinance. The offence under section 199 of the Penal Code of which the appellant has been convicted of course falls to be tried in accordance with the provisions of the C.P.C.

The ground of appeal which the court is now dealing with concerns the construction of section

335(3) of the C.P.C. and in particular, this involves consideration as to whether the two offences of which the appellant was convicted are offences against his landlords' "own person or property" within the meaning of that subsection. There is no question of either of the offences being against the own person of any of his landlords and the remaining question to be considered is whether such offences are against their property. Only if the court rules that the two offences were against the appellant's landlords' property would it be necessary to further consider whether the case against the appellant was a non-seizable case. However, in this connection, it is common ground that the two offences are non-seizable offences so that, in respect of either offence, the case against the appellant was a non-seizable one.

In relation to the question of whether an offence under section 199 of the Penal Code is an offence against property, it seems clear that the answer is in the negative. This is because that offence is listed under Chapter XI of the Penal Code under the heading — "False evidence and offences against public justice" in contradistinction to offences listed under Chapter XVII of that Code under the heading — "Offences against property". *Prima facie*, therefore, unless the respondent is able to show that an offence under section 199 of the Penal Code, although listed as mentioned above, could nevertheless be regarded as an offence against property within the meaning of section 335(3) of the C.P.C., then clearly such an offence cannot be regarded as an offence against property. In this connection, it is to be noted that under the Penal Code, a distinction is made between offences affecting the human body which are listed under Chapter XVI which in my opinion would cover offences against a complainant's own person, and, as already indicated, offences against property listed under Chapter XVII of the said Code and offences for giving false evidence and offences against public justice listed under Chapter XI of the said Code. Because of this clear-cut distinction, it seems to me to be unarguable that any offence falling under Chapter XI of the said Code which includes an offence under section 199 of the Penal Code can in any way be regarded either as an offence against the person, or against the property of a person. It follows that an offence under section 199 of the Penal Code cannot in any sense be regarded as an offence against the person or the property of a private prosecutor within the meaning of section 335(3) of the C.P.C. Learned counsel for the respondent has not been able to advance any acceptable argument that the contrary view is true. Accordingly, on this short ground, I hold that the ground advanced by the appellant against the jurisdiction of learned counsel for the respondent conducting the prosecution in the lower court for an offence against him under section 199 of the Penal Code succeeds.

Learned counsel for the respondent has argued that even if the learned trial magistrate wrongly applied the provisions of section 335(3) of the C.P.C. in the instant case under appeal, he nevertheless has a discretionary power under section 335(2) of that Code, which enables the said prosecution to be conducted as the court shall direct and in the instant case, the learned trial magistrate has impliedly directed that the complainant or his advocate may conduct the prosecution. With respect, the learned trial magistrate has, as earlier indicated, expressly stated that in allowing the private prosecution to proceed, he has acted under section 335(3) of the C.P.C. It seems clear from the record of proceedings that at no stage in the proceedings did the learned trial magistrate bring his mind to bear upon the provisions of section 335(2) of that Code. Learned counsel for the respondent has submitted, and I think rightly submitted, that the power conferred upon the court by section 335(2) of the said Code is directory and not mandatory in nature. In the instant case, it is abundantly clear that the learned trial magistrate has not exercised his power under the said provisions; nor has he considered whether he should exercise such a power. Learned counsel for the respondent has raised the question whether this constitutes an omission within the meaning of section 331 of the C.P.C. which is curable under that section to save the proceedings before the lower court from being a nullity. In my view, the answer is in the negative. In coming to this conclusion, I bear in mind the authorities which distinguish between an illegality which would render the whole proceedings null and void and an irregularity which is curable under section 331 provided that it has not occasioned a failure of justice. Learned counsel for the respondent has submitted that such an omission may be regarded as coming within the ambit of section 331 of the C.P.C. and further, that the learned trial magistrate in taking cognizance of the offence and approving the summons, had in effect decided and directed that the prosecution could be conducted by learned counsel for the respondent under section 335(3) of the C.P.C. I do not think that this argument can be accepted because, for reasons given below, I consider that there was no legally-competent person to conduct the prosecution. This would constitute an illegality which is not curable under section 331. The learned trial magistrate having acted under section 335(3) of the C.P.C., I do not consider that it can be argued that he had impliedly proceeded under section 335(2) of that Code as well, because in my opinion, the provisions of section 335(2) only become applicable if section 335(3) is not applicable. Even if it can be said that the two subsections are not mutually exclusive, it seems clear in the circumstances as disclosed by the record of proceedings that the learned trial magistrate cannot be regarded as having exercised his discretionary power under section 335(2) for reasons which have already been given. Furthermore, I am of the opinion that before a court is in a position to exercise the discretionary power conferred under section 335(2), all matters which are relevant should be made available to the court in order to enable it to properly and judicially exercise that discretionary power. It may be said that such relevant matters had already been placed before the learned trial magistrate before he approved the issue of the summons against the appellant, but in my view, this is only partially true. Section 335(2) is relevant only if there is no "authorized person" available to conduct a particular prosecution or inquiry in any case. This would in my opinion also involve consideration as to whether any of the authorized persons listed in section 335(1) is available. In the instant case, it is clear that the possibility of any of the persons listed in section 335(1) conducting

this particular prosecution was never considered by the learned trial magistrate so that it cannot be said that he had impliedly exercised his power under section 335(2). The point has been canvassed as to whether the expression "authorized person" within the meaning of section 335(1) covers any of the persons listed in section (335(1) only or extends to the persons mentioned in section 335(3) as well. In my opinion, the answer is that it covers the persons listed under both subsections. This is clear particularly upon a consideration of the provisions of section 335(1)(f). That subsection reads:—

"335. (1) Every criminal prosecution and every inquiry shall be conducted —

(f) by any person authorized to conduct criminal prosecutions or inquiries by the provisions of any enactment or written law in matters authorized by that enactment or written law."

Nowhere in section 335 is there any provision excluding the C.P.C. itself as a "written law" within the meaning of the above-quoted provisions, bearing in mind in particular the definition of "written law" in section 3(1) of the Interpretation Ordinance (Cap. 1). Hence, it follows that any person mentioned under section 335(3) of the C.P.C. comes within the definition of "any person authorized to conduct criminal prosecutions" under section 335(1)(f) of that Code. It follows that "authorized person" in section 335(2) is applicable to the categories of persons listed under both section 335(1) and section 335(3). If this is correct, it means that in any case where there is no authorized person under section 335(1) to conduct a prosecution which does not fall within the ambit of the kinds of offences and categories of cases specified in section 335(3), then it is open to the court to act under section 335(2).

For the above reasons, I hold that in respect of the offence under section 199 of the Penal Code, there being no legally-competent person to conduct the prosecution against the appellant in the lower court and there being none who was directed by the lower court to conduct such prosecution, the whole proceedings in relation to the charge under the said section are null and void.

As regards the prosecution of the offence punishable under section 17(2) of the Rent Control Ordinance, this also involves the consideration of whether it is an offence against the person or the property of the landlords of the appellant. I am aware that there have been a number of private prosecutions for similar offences in the past, but as far as is known, the point now taken by the appellant concerning the scope of section 335(3) of the C.P.C. in relation to such offences has not been taken or decided before. Such an offence cannot in any sense be regarded as an offence against the persons of the landlords of the appellant or any of them. The further point to consider is whether it may be regarded as an offence against their property. In this connection, the subject-matter of the offence is the statutory declaration which relates, *inter alia*, to particulars about the subletting of the premises concerned by the appellant as tenant. In my opinion, an offence committed in connection with such a statutory declaration can in no sense be regarded as against property; and the definition of "property" in section 3(1) of the Interpretation Ordinance (Cap. 1) does not carry the matter any further. I am not attracted by the argument of learned counsel for the respondent that since such an offence was committed in connection with a statutory declaration relating to property, it may therefore be regarded as an offence against property. It is clear in my opinion on a construction of the provisions of section 17(2) of the Rent Control Ordinance that the offence of which the appellant was convicted which relates to failure to comply with the requirements of a notice given to him by his landlords by failing to include in his statutory declaration the name of one of his tenants, is an offence connected with the failure to make a particular statement in a statutory declaration relating to a subtenancy or, for that matter, the use or occupation of premises. By no stretch of imagination can such an offence be regarded as an offence against property and therefore as coming within the ambit of section 335(3), unless it is statutorily provided otherwise — and there are no such statutory provisions. I am therefore driven to the conclusion that because of this, the prosecution in the instant case is not one which comes within the ambit of this section. For the same reasons, as already given above, I also hold that section 335(2) of the C.P.C. is not applicable to this case. It therefore follows, and I hold, that in respect of the prosecution for the offence under section 17(2) of the Rent Control Ordinance, there was no authorized person to conduct that prosecution and none had been directed by the court to do so with the consequence that the whole proceedings in the lower court in relation to the prosecution for this particular offence are also null and void.

The result is that the appellant succeeds in his contention that the proceedings against him in the lower court are null and void, and the appeal is allowed on this ground.

Appeal allowed.

Solicitors: *Tang & Co.; Chong Bros.*